

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MATT PETROLEUM CORPORATION</b>	:	ORDER
<b>D/B/A GRACE PETROLEUM CO.</b>	:	DTA NO. 816978
	:	
for Review of a Cancellation, Revocation or Denial of	:	
a License or Registration as a Residual Petroleum	:	
Product Business under Article 13-A of the Tax Law.	:	

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Petitioner, Matt Petroleum Corporation d/b/a Grace Petroleum Co., 201 Leland Avenue, Utica, New York 13502, filed a petition for review of a cancellation, revocation or denial of a license or registration as a residual petroleum product business under Article 13-A of the Tax Law.

On March 3, 1999, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.9(a)(4). On April 1, 1999, the Division of Taxation, by Terrence M. Boyle, Esq. (Christina L. Seifert, Esq., of counsel), submitted documents in support of dismissal. On April 2, 1999, petitioner appearing by its president, John L. Matt, Jr., submitted a letter in response. After due consideration of the documents submitted, Jean Corigliano, Administrative Law Judge, issues the following order.

***ISSUE***

Whether petitioner timely filed a petition following the issuance of a conciliation order.

***FINDINGS OF FACT***

1. Petitioner, Matt Petroleum Corporation d/b/a Grace Petroleum Company, filed a request for a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”), and a conference was held on September 17, 1998. Petitioner appeared by Michael J. Spohn who was then the corporation’s authorized representative.

2. Following a conference, BCMS issued a Conciliation Order, dated October 30, 1998, denying petitioner’s request and sustaining a Notice of Cancellation of a Residual Petroleum Products Registration.

3. On February 22, 1999, the Division of Tax Appeals received the petition in this matter. The envelope bearing the petition was sent by regular United States mail and bore a metered mail date stamp of February 16, 1999. The petition was signed by John L. Matt, Jr., President. Mr. Matt also executed a document entitled Proof of Services certifying that the petition was mailed on February 16, 1999. The document bears the following legend: “PROOF OF SERVICE FOR INSTITUTIONALIZED OR INCARCENATED [sic] LITIGANTS.”

4. On March 3, 1999, the Petition Intake, Review and Exception Unit of the Division of Tax Appeals issued a Notice of Intent to Dismiss Petition to petitioner with a copy to the Division of Taxation (“Division”). The notice states:

You are hereby notified of our intent to dismiss the petition in the above-referenced matter.

Pursuant to section 170.3-a(e) of the Tax Law, a petition must be filed within ninety days from the date a Conciliation Order is issued.

The Conciliation Order was issued on October 30, 1998 but the petition was not filed until February 16, 1999 or one hundred and nine days later.

“Pursuant to section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments regarding the proposed dismissal.”

5. In response to the Notice of Intent to Dismiss, the Division submitted affidavits from two Division employees, Thomas J. English and James Baisley, explaining the Division's mailing procedures for conciliation orders; a copy of a certified mail record; and a copy of the conciliation order which denied petitioner's request and sustained the statutory notice.

6. The affidavit of Thomas English, Assistant Supervisor of Tax Conferences in BCMS, sets forth the Division's general procedure for preparing and mailing out conciliation orders. All conciliation orders mailed within the United States are sent by certified mail. BCMS prepares the conciliation orders and the mailing documents including a document which lists the taxpayers to whom conciliation orders are being sent by certified mail on a given day. This document is referred to as a certified mail record. A certified control number is assigned to each conciliation order listed on the certified mail record. According to Mr. English, each page of a certified mail record is a separate certified mail record for the conciliation orders listed on that page only, and each page contains spaces to record the “Total Number of Pieces Listed by Sender” and the “Total Number of Pieces Received at Post Office” for conciliation orders listed on that page only. There is also a space on each individual certified mail record for the receiving postal employee to affix his or her signature.

7. Mr. English states that the copy of the three-page certified mail record attached to his affidavit is a true and accurate copy of the original. It contains a list of the conciliation orders allegedly issued by the Division on October 30, 1998. The certified control numbers on this document run consecutively throughout the three pages, from Z257570719 through Z257570754. All the names and addresses listed on the certified mail record have been redacted except the

entries for petitioner and its representative, Michael J. Spohn. Their names and addresses appear on page 3 of the certified mail record with the certified mail number Z257570753 appearing next to the name Matt Petroleum Corp, PO Box 536, Leland Avenue, Utica, NY 13503, and the certified mail number Z257570754 appearing next to the name Michael J. Spohn, 300 Oriskany Boulevard, Yorkville, NY 13495.

8. Each of the three pages of the certified mail record submitted is date stamped October 30, 1998 by the Colonie Center branch of the U.S. Postal Service in Colonie, New York, and each contains a postal employee's initials verifying receipt. At the bottom of page three, the page on which petitioner's certified number is listed, the number "12" has been entered as the "Total Number of Pieces Listed by Sender," and the number "12" has also been entered as the "Total Number of Pieces Received at Post Office." There are 12 certified mail numbers listed on page three of the certified mail record.

9. Mr. English states that after the certified mail records and the conciliation orders are prepared for mailing, they are picked up in the offices of BCMS by an employee of the Division's Mail Processing Center.

10. Attached to Mr. English's affidavit as Exhibit "B" is a copy of the Conciliation Order, CMS No. 170055, dated October 30, 1998, which denied petitioner's request and sustained the statutory notice.

11. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service. Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and

places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, a member of the mail processing center staff delivers them to the Colonie Center branch of the United States Postal Service ("USPS") in Albany. The postal employee affixes either a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail listed on that document. In this case, the postal employee wrote the total number of pieces, initialed the certified mail record, and affixed a postmark which indicates that this was the total number received at the post office. Mr. Baisley's knowledge that the postal employee wrote the total number of pieces to indicate that 12 pieces were received at the post office is based on the fact that the Division's Mail Processing Center requested that postal employees either circle the number of pieces received or indicate the number of pieces received by writing that number on the mail record. In the Division's ordinary course of business, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

12. In response to the Notice of Intent to Dismiss Petition, John L. Matt, Jr., petitioner's president, submitted a letter which was mailed by certified mail on April 2, 1999. As pertinent, the letter states:

Please be advised that I am the sole stock [sic] holder and decision maker of Matt Petroleum Corp D/B/A Grace Petroleum Co. That your department received my petition Feb. 16, 1999. The Conciliation Order was brought to my attention on December 10, 1999 [sic] for I was incarcerated in the U.S. Bureau of prisons during the possible receipt of the Conciliation Order.

I believe that the petition filed meets the criteria on the above captioned matter in regards to incarcerated Stock Holders.

### **CONCLUSIONS OF LAW**

A. A petition contesting a statutory notice of cancellation of registration as a residual petroleum product business must be filed within 90 days of the issuance of the notice (*see*, Tax Law § 302[b]; § 283[6][a]; § 288[5]). As an alternative, a taxpayer may request a conciliation conference in BCMS; the time period for filing such a request is also 90 days (*see*, Tax Law § 170[3-a][a]). A conciliation order is binding on both the Division and the taxpayer unless the taxpayer petitions for a hearing within 90 days after the conciliation order was issued (Tax Law § 170[3-a][e]). The filing of a petition within this time frame is a prerequisite to the jurisdiction of the Division of Tax Appeals which has no authority to consider a petition which is not filed within 90 days of the issuance of a conciliation order (*Matter of Roland*, Tax Appeals Tribunal, February 22, 1996).

B. Where the taxpayer files a petition, but the timeliness of the petition is at issue, the Division has the burden of proving proper mailing of the conciliation order (*see, Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). The mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of orders by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

The affidavits of two Division employees, Thomas J. English and James Baisley, provide adequate proof of the Division's standard mailing procedure for the mailing of conciliation orders by certified mail. The affidavits generally describe the various stages of producing and mailing

conciliation orders, and, in addition, attest to the authenticity and accuracy of the copies of the conciliation order and the certified mail record submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the English and Baisley affidavits were followed with respect to the Conciliation Order issued to petitioner. Petitioner's name and address appears on page three of the certified mail record which bears a USPS date stamp of October 30, 1998 and the initials of a postal service employee. There are 12 certified mail control numbers listed on page three, and the USPS employee who initialed the certified mail record indicated that he received 12 items for mailing. In short, the Division established that it mailed the Conciliation Order to petitioner by certified mail on October 30, 1998. The same evidence establishes that a copy of the Conciliation Order was mailed to Michael J. Spohn on the same date. Mr. Spohn represented petitioner at the BCMS conference and, therefore, was appropriately mailed a copy of the Conciliation Order.

Petitioner's petition was received by the Division of Tax Appeals on February 22, 1999 and deemed filed on February 16, 1999, which is 109 days after the mailing of the Conciliation Order. Since the petition was not mailed to the Division of Tax Appeals within the statutory 90-day period, the Division of Tax Appeals has no authority to hear petitioner's challenge to the Conciliation Order.

C. The petition of Matt Petroleum Corporation, d/b/a Grace Petroleum Co. is dismissed with prejudice.

DATED: Troy, New York  
May 13, 1999

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE

